

**IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA**

DWIGHT E. HAND, M.D.,

Plaintiff,

v.

THE AMERICAN BOARD OF SURGERY, INC.

Defendant.

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CIVIL ACTION
NO. 01-2172

Memorandum and Order

YOHN, J.

February , 2002

Dwight E. Hand, M.D., brings suit against the American Board of Surgery, Inc. (the Board) on two counts of alleged breach of contract after he failed to pass the examination required for a certificate from the Board. Hand's first count alleges that the Board "affirmatively misrepresent[ed]" the results of its examination, and destroyed the notes and tapes from the process. Hand's second count alleges that the Board "fail[ed] to comply with its own by-laws and appeals procedures" when Hand challenged the results of the examination.

The Board denies Hand's allegations, noting that he presents no specific evidence to support the assertion that the answers he gave should be evaluated differently from the failing marks recorded by the examiners. The Board then contends that, although Hand's challenge was heard by a different committee than that listed in the Board's by-laws, Hand was "permitted to pursue and, in fact, pursued three levels of appeal consistent with the Board's policy."

Now before me is the Board's motion for summary judgment. The motion will be granted because Hand does not proffer adequate evidence of misrepresentation on the part of the Board or lack of adequate process in the consideration of his appeal to surmount the legal standard for summary judgment.

SUMMARY JUDGMENT STANDARD

Either party to a lawsuit may file a motion for summary judgment, and it will be granted “if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.” Fed. R. Civ. P. 56(c). “Facts that could alter the outcome are ‘material,’ and disputes are ‘genuine’ if evidence exists from which a rational person could conclude that the position of the person with the burden of proof on the disputed issue is correct.” *Ideal Dairy Farms, Inc. v. John Lebatt, LTD*, 90 F.3d 737, 743 (3d Cir. 1996) (citation omitted). The moving party bears the initial burden of showing that there is no genuine issue of material fact. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986). Where the nonmovant bears the burden of persuasion at trial, the moving party may meet its initial burden and shift the burden of production to the nonmoving party “by ‘showing’ – that is, point[ing] out to the district court – that there is an absence of evidence to support the nonmoving party’s case.” *Id.* at 325. The non-moving party must present more than “[t]he mere existence of a scintilla of evidence” for elements on which he bears the burden of production. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 252 (1986). Thus, summary judgment will be entered “against a party who

fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." *Celotex*, 477 U.S. at 322.

FACTS¹

As necessary on a motion for summary judgment, the facts that follow are viewed and all reasonable inferences are drawn in favor of Hand as the non-moving party. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986); *Oritani Savings & Loan Assoc. v. Fidelity & Deposit Co. of Maryland*, 989 F.2d 635, 638 (3d Cir. 1993); *Troy Chemical Corp. v. Teamsters Union Local No. 408*, 37 F.3d 123, 125 - 26 (3d Cir. 1994).

Dwight E. Hand is a licensed medical doctor residing and practicing in the State of California. First Am. Compl. at ¶ 1. The American Board of Surgery operates from its principal place of business in Philadelphia, Pennsylvania.² *Id.* at ¶ 2. On June 25, 1995, Hand applied to sit for the Board's examination to obtain a specialist certificate in surgery. Pl.'s Counterstatement of Facts [hereinafter Pl.'s Counter.] at 1.

¹ Hand has not, as per the court's scheduling order, "file[d] a separate, short and concise statement, responding to the numbered paragraphs in which the moving party's statement, of the material facts as to which the opposing party contends there is a genuine issue to be tried and [conforming] to the [same] record citations requirements [as for the moving party]." Scheduling Order of July 25, 2001 at ¶ 7. He included in his reply brief a counter-statement of facts in narrative form that was not directly responsive to the Board's document. Pl.'s Rep. Br. at 1 - 4. As a result, I have included the facts as he described them in his complaint and in his reply brief. When facts were not available from Hand's complaint or reply brief, I turned to his attached deposition. When facts were crucial to the context and narrative of Hand's claim, but not available from any of the sources above, I included them from uncontested portions of the defendant's Statement of Material Facts Not in Dispute.

² The case is before this court on diversity grounds and both parties argue that Pennsylvania law applies.

In his application for admission, Hand signed a statement that read “I hereby make application to the American Board of Surgery, Inc. for admission to the examination leading to my Certification as a Specialist in Surgery, all in accordance with and subject to its requirements, rules and regulations, and enclose the Registration Fee.”³ Pl.’s Resp. Appendix A.

The American Board of Surgery is a private, voluntary, non-profit corporation formed to conduct examinations of candidates who seek certification and to improve training opportunities for surgeons. Def.’s Statement of Material Facts Not in Dispute [hereinafter Material Facts] at ¶ 3. The Board’s certification examinations consist of a written component and an oral component. Hand Dep. at 24. The written component is a one-day multiple-choice examination testing general surgical principles and underlying basic sciences. Hand Dep. at 24; Material Facts at ¶ 11. The oral component consists of three, thirty-minute interview sessions with teams of examiners who probe the candidate’s level of surgical judgment, problem-solving ability, and sensitivity to moral and ethical issues. Hand Dep. at 24; Material Facts at ¶¶ 13, 16. Applicants to the Board are given five attempts to pass a written examination, and then three attempts within five years to pass an oral examination. Material Facts at ¶ 14. If a candidate fails at the end of these attempts, he must enroll in an additional educational program for a year before the Board will allow him to attempt the series again. Pl.’s Counter. at 3; Material Facts at ¶ 26.

³ The agreement also included a provision releasing the Board from liability: “I agree to hold [the Board] free from any damage or complaints by reason of any action [it] may take in connection with this application, such examinations, the grade or grades given with respect to any examination and/or the failure of said [Board] to issue me such Certificate. . . . I understand that the decisions as to whether my examinations qualify me for a Certificate rest solely and exclusively in the Board and its decision is final.” Pl.’s Resp. Appendix A. As I decide the case on other grounds, I need not address whether this release was valid.

In the oral examination, each candidate is interviewed by two examiners at a time. Hand Dep. at 25, 68. Thus, over a standard three-interview examination, the candidate meets with six examiners. *Id.* at 68. Examiners must have been Board-certified for more than five years, have a currently valid certificate, and be actively engaged in the practice or teaching of surgery. Material Facts at ¶ 18. They are provided with no information about the candidate other than name and number, Hand Dep. at 66; if an examiner has more than a casual relationship with a candidate or has participated in a major fashion in the final two years of the candidate's training, the Board will replace that examiner with another who does not know the candidate. Material Facts at ¶ 23.

Candidates are graded on a simple scale. Four is a failing grade and cannot be changed. Hand Dep. at 32. Six is a passing grade and cannot be changed. Material Facts at ¶ 35. Five is an indeterminate grade and must be eventually changed to either a four (a failing mark) or a six (a passing mark). Hand Dep. at 31 -32. Candidates must pass two of their three interviews with marks from both examiners. *Id.* at 32.

Hand passed the written examination on his third attempt, Hand Dep. at 24, but was informed that he had failed all three of his oral examinations. Hand Dep. at 26, 29 - 30, 31 - 32. Hand failed his first oral examination on June 9, 1998. *Id.* at 26. From the six examiners, Hand received five failing scores and one passing score. *Id.* He requested a critique of his performance but did not challenge the administration of the examination. *Id.* at 28. Hand failed his second oral examination on June 7, 1999. *Id.* at 29 - 30. None of the six examiners gave him a passing score. *Id.* Hand again requested a critique of his performance, but again did not challenge the administration of the examination. *Id.* at 30.

During his oral examination on February 14, 2000, Hand appeared before three panels of examiners, each of which presented him with a medical scenario and questioned him about its implications. Pl.'s Counter. at 2. Hand answered the questions. *Id.* Later that day, Hand recorded personal notes regarding the questions he was asked and the answers he provided during the exam. *Id.*

On February 18, 2000, the Board sent Hand a notice that he had failed this third oral examination. *Id.* Hand had received four failing marks and two fives that were later changed to failing marks. Hand Dep. at 31 - 32. To pass an exam, the candidate must pass two of his three interviews. *Id.* at 32. Both sets of examiners in Hand's first interview and third interview failed him outright. *Id.* The two examiners in his second interview gave him marks of five that were later changed to failing grades. *Id.* Even had these two fives been changed to passing marks, Hand could not have passed the examination. *Id.*

On March 2, 2000, Hand requested an individualized critique of his performance in a letter to the Board. Pl.'s Counter. at 2. The Board is not under any contractual obligation to produce a critique for candidates, but offers to do so to enable candidates to improve on their performance. Material Facts at ¶ 47. The critique was prepared on March 15, 2000 by the Board's Executive Director, Wallace Ritchie, M.D., from the notes and tapes of the Hand's examiners. Pl.'s Counter. at 2; Material Facts at ¶ 46, 78 - 79. Dr. Ritchie had not been one of Hand's examiners and had not been present during Hand's examination. *See* Material Facts at ¶ 46; Ritchie Dep. at 33 - 35. The preparation of the critique was totally independent of the grading of Hand's examination, recorded on an appraisal sheet immediately after the examination on February 14, 2000 by Dr. Numann from the examiners' marks. Material Facts at ¶¶ 41 - 44.

Hand contends that he found inconsistencies between his notes from the examination and the Board's critique of his performance. *Id.* He presents no evidence though comparing his notes from the examination with the questions posed to him or answers expected of him in the examination. *See* Pl.'s Counter. at 1 - 4. He does not refute that the grades the examiners reported to Dr. Numann at the appraisal session were any different from the grades the examiners recorded at the time Hand left the rooms of each interview. *See id.* The Board destroyed its notes and the tape recordings from the examination pursuant to its normal policies in May 2000. *Id.* at 3; Material Facts at ¶¶ 48 - 49.

Hand challenged the Board's results on June 9, 2000, alleging that the examiners had misrepresented the questions presented to him and his responses. *Id.* at 2 - 3. His challenge was heard by the Credentials Committee, which resolves disputes over examination results, rather than the Examination Committee, which investigates the integrity of the examination process itself. *Id.* at 3.

On June 22, 2000, the Credentials Committee declined to void the results of the examination. *Id.* It then denied Hand's request for reconsideration. *Id.*; Material Facts at ¶¶ 84, 86. Hand testified before the Board in an Informal Hearing process, but his request to void the results of the examination was again denied. Material Facts at ¶¶ 87, 88. Hand received a Formal Hearing before the Board on June 17, 2001. Pl.'s Counter. at 3. The hearing occurred before at least five directors of the Board who had no relationship or involvement with Hand. Material Facts at ¶¶ 55 - 56. Hand appeared in person and with counsel. *Id.* at ¶¶ 57, 90. At his third level of review, the Board denied his appeal to overturn the examination results for a fourth and final time. Hand Dep. at 64.

Hand contends that, as a result of the Board's breaches of contract, he may lose his present position at Pomona Valley Hospital Medical Center as well as his membership in the American College of Surgeons and Society of Thoracic Surgeons. Pl.'s Counter. at 3. He has already lost his membership in the American College of Cardiology. *Id.* The loss of these positions and memberships will both substantially impact his wages and compensation, and force him to purchase separate, expensive "tail coverage" malpractice insurance. *Id.*

In order to sit for the Board's examination again and restore his memberships, Hand would need to take a year from of his practice of medicine to study in a Board-approved program. *Id.* He contends that the lost earnings from that additional year of study and attorney fees should be included in the calculation of his consequential damages. *Id.*

DISCUSSION

Count One

Hand's first count alleges "affirmative[] misrepresent[ion]" on the part of the examiners, and that the Board destroyed notes and tapes from the examination. He does not describe what part of his contract with the Board these actions would have breached other than an "implicit[]" agreement that the examination would be "graded and evaluated in an accurate manner" and that the examination would be administered "in accordance with the [Board's] requirements, rules and regulations." Pl.'s Amend. Compl. at ¶ 6.

Hand, however, provides no details to this court about what his answers were in the underlying examination and how they should have qualified him for a passing score. Nothing in Hand's complaint, brief, or deposition establishes a factual dispute about the sufficiency of his

answers in the examination itself. Hand did claim that he took notes of his experience after the exam, but cannot produce them now. Hand Dep., at 58. Neither the notes, nor Hand's memory of their contents, has ever been entered into the record. *See Orson, Inc. v. Miramax Film Corp.*, 79 F.3d 1358, 1370 (3d Cir. 1996) (noting that a party's assertions about improper behavior, without more, lack legal significance in evaluating its claims).

Hand's claim then is that his memory of the examination differs from the independent critique developed by the Board's Executive Director for his benefit. But, even on this ground, Hand does not proffer how the critique differed from his experience in the examination. As the Third Circuit has written, a party's wholly speculative assertions cannot satisfy the threshold of evidence necessary to survive a motion for summary judgment. *Jersey Central Power & Light Co. v. Township of Lacey*, 772 F.2d 1103, 1109 (3d Cir. 1985) ("Although the burden of proof rests initially with the party moving for summary judgment, when a motion is made and supported, the nonmoving party must produce specific facts showing that there is a genuine issue for trial, rather than resting upon the assertions of pleading; a genuine issue means that the evidence must create a fair doubt, and wholly speculative assertions will not suffice.") (citation omitted). Hand cannot press his case in the form of legal conclusions: he must support his accusations against the Board with specifics to create an issue of material fact. *Securities and Exchange Comm'n v. Bonastia*, 614 F.2d 908, 914 (3d Cir. 1980); Fed. R. Civ. P. 56(e).

Hand also contends that the Board's original notes and tapes from the examination were destroyed before he could use them in his appeals process. Pl.'s Amend. Compl. at ¶ 22. But this broke no "rule or regulation" in his contract with the Board. *Id.* at ¶ 6. In explanation, the Board documents that it routinely recycles these records on a schedule 90 days after mailing the

results of the examination, unless notified of a challenge. Material Facts at ¶ 48; Pl.'s Counter. at 2 - 3. The Board released the results of the examination in February 2000, Pl's Counter. at 2; it recycled the tapes and notes from the examination 90 days afterwards in May 2000. *Id.* at 3. Hand produces no evidence to the contrary. Hand notified the Board that he wanted to challenge the results of the examination on June 13, 2000, too late to be within the 90-day window. *Id.* at 2 - 3.

Hand contends that the Board should have been on notice in May that he wanted to challenge the examination because he had requested an individual critique. *Id.* Yet Hand had requested critiques each time he had failed before and never challenged those exams. Hand Dep. at 28, 30. Hand was on notice of what constituted a challenge and chose not to challenge the results of the examination until after the 90-day window. Hand Dep. at 28 - 30. He cannot now bring a claim against the Board for breach of contract when the Board followed its rules and he was the party who failed to timely initiate the required process. *Id.*

As Hand presents no specific evidence to support his first breach of contract claim, the material facts relevant to his claim are not in dispute. *Country Floors, Inc. v. A Partnership of Gepner and Ford*, 930 F.2d 1056, 1061 - 62 (3d Cir. 1991) (citation omitted). Without a

“scintilla” of evidence, his claim does not survive summary judgment.⁴ *Anderson*, 477 U.S. at 252.

Count Two

Hand’s second claim is that the Board did not properly follow procedure in considering his appeals. He alleges that, according to the Board’s by-laws, his challenge should have been heard by its Examination Committee rather than its Credentials Committee. The Board acknowledges that its bylaws require challenges to the administration of examinations themselves to be sent to the Examination Committee, but contends that Hand received the full process he was entitled to.

Any analysis of Hand’s second count must turn on the fact that he proffers no evidence he suffered prejudice from the Board’s decision to refer his claim to the Examination Committee rather than the Credentials Committee. According to Pennsylvania law, the vital components of a breach of contract claim are (1) the existence of a contract, including its essential terms, (2) a breach of a duty imposed by a contract, and (3) resultant damages. *See, e.g., Reformed Church of the Ascension v. Theodore Hooven & Sons, Inc.*, 764 A.2d 1106, 1109 (Pa. Super. 2000); *CoreStates Bank N.A. v. Cutillo*, 723 A.2d 1053, 1058 (Pa. Super. 1999). In the context of contesting a motion for summary judgment, the nonmovant must establish the existence of each

⁴ Granting summary judgment against Hand’s unsubstantiated accusations is not a penalty against him as a party; it is the proper use of a procedural tool to dismiss these claims as lacking evidentiary foundation, thereby advancing the interests of justice and maintaining the efficiency of the court system. *See Celotex*, 477 U.S. at 327. As the Third Circuit has recognized, the underlying purpose of summary judgment is to avoid trial in cases where it is unnecessary, causing only delay and expense. *Goodman v. Mead Johnson & Co*, 534 F.2d 566, 573 (3d Cir. 1976). In other words, “[s]ummary judgment may present the district court with an opportunity to dispose of meritless cases and [to] avoid wasteful trials.” *Orson, Inc. v. Miramax Film Corp.*, 79 F.3d 1358, 1366 (3d Cir. 1996) (citing *Celotex*, 477 U.S. at 327).

element of his claim. *J.F. Feeser, Inc. v. Serv-A-Portion, Inc.*, 909 F.2d 1524, 1531 (3d Cir. 1990) (citing *Celotex*, 477 U.S. at 323). Without allegation that he suffered prejudice from the Board's decision, Hand fails to establish a causal connection between the Board's breach and his damages, neglecting an essential element of his breach of contract claim. *Anderson*, 477 U.S. at 248; *Ridgewood Bd. of Educ. v. N.E. for M.E.*, 172 F.3d 238, 252 (3d Cir. 1999); *Williams v. Borough of West Chester*, 891 F.2d 458, 460 (3d Cir. 1989); *Woods v. Bentsen*, 889 F. Supp. 179, 184 (E.D.Pa. 1995).

Another way to characterize this flaw in Hand's claim is that, although the Board did not follow its rules and regulations in referring his challenge to the Credentials Committee, its breach of contract was not material. See *Sgarlet v. Griffith*, 36 A.2d 330 (Pa. 1944) (adopting the equitable doctrine of substantial performance in Pennsylvania law). Here Hand received three levels of procedure, the last two of which, the informal and formal hearings, were identical to what he would have received had his claim been referred to the Examination Committee. Material Facts at ¶¶ 87, 88; Pl.'s Counter. at 3; Hand Dep. at 64. He had the opportunity to present the evidence available to him and to testify before the Board in his last two hearings. Hand Dep. at 64. At the formal hearing, Hand was even represented by counsel. *Id.* at 65 Hand acknowledges in his deposition that his counsel was "of eminent repute in this community." *Id.*

Without allegation that Hand suffered prejudice, the Board's breach of contract cannot be material. *Barraclough v. Atlantic Refining Co.*, 326 A.2d 477, 480 (Pa. Super. 1974); *Lengyel v. Heidelberg Sports Enterprises, Inc.*, 194 A.2d 869, 872 - 73 (Pa. 1963). Pennsylvania caselaw

then requires me to dismiss this second count of his claim.⁵ *Sgarlet*, 36 A.2d at 332; *Reformed Church* 764 A.2d at 1109.

Conclusion

For the reasons stated above, I find that Hand has failed to proffer evidence sufficient to sustain either of his counts against the Board. I therefore grant the Board's motion for summary judgment. An appropriate order follows.

⁵ The Board argues that, although its bylaws grant its Examination Committee jurisdiction over changes to the format, substance, and scoring of the examination, the Board has sent all complaints about marks and requests for reexamination to the Credentials Committee for as many years as the Board's executive director can remember. In deposition testimony, the Board's executive director asserted that the Credentials Committee had far more expertise in hearing challenges such as Hand's and in awarding the type of remedies he requested. Ritchie Dep. at 53 - 54. The Board gave Hand three separate opportunities to testify during its proceedings and he was represented by counsel in the final stage.

According to this argument, Hand did receive the full process he was due and there should be no cause for his claim for breach of contract. I decline to rule for the Board on this ground though because it necessitates too detailed a review of the Board's internal processes, a function that courts have been traditionally reluctant to assume. *See, e.g., Schulz v. U.S. Boxing Ass'n*, 105 F.3d 127, 132 (3d Cir. 1997) ("[C]ourts have been understandably reluctant to interfere with the internal affairs of [private] associations and their reluctance has ordinarily promoted the health of the society.") (quoting *Falcone v. Middlesex Medical Society*, 170 A.2d 791, 796 (N.J. 1961)); accord *Marjorie Webster Junior College, Inc. v. Middle States Association of Colleges and Secondary Schools*, 432 F.2d 650, 655 - 57 (D.C. Cir. 1970), *cert. denied* 400 U.S. 965; *Silver v. Castle Memorial Hospital*, 53 497 P.2d 564, 567 - 68 (Haw. 1973), *cert. denied*, 409 U.S. 1048.

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Plaintiff,

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THE AMERICAN BOARD OF SURGERY, INC.

Defendant.

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CIVIL ACTION
NO. 01-2172

Order

And now, this day of February 2002, after careful consideration the defendant's motion for summary judgment (Doc. No. 13), and plaintiff's response thereto (Doc. No. 16), as well as defendant's reply (Doc. No. 17), for the reasons set forth in the accompanying Memorandum it is hereby ORDERED that the defendant's motion for summary judgment (Doc. No. 13) is GRANTED and judgment is entered in favor of defendant The American Board of Surgery, Inc. and against plaintiff Dwight E. Hand, M.D.

BY THE COURT:

William H. Yohn, Jr., Judge